No. 13012

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEE ARENAS,

Appellant,

vs.

UNITED STATES OF AMERICA and ELEUTERIA BROWN ARENAS, also known as DELLA NICHOLSON,

Appellees.

OPENING BRIEF FOR APPELLANT, LEE ARENAS.

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Opinion Below.

The opinion of the District Court is reported in 95 Fed. Supp. 962, and is also set out in the Transcript of Record at pages 20-53.

Jurisdiction.

This is an appeal by plaintiff, Lee Arenas, from the final judgment of the District Court entered March 8, 1951. Notice of appeal was filed April 3, 1951.

The jurisdiction of the District Court was invoked under the Act of August 15, 1894, as amended, 25 U. S. C. A., Section 345, and under the Act of March 3, 1911, as amended, 28 U. S. C. A., Section 1353, and under the Act of March 4, 1931, as amended, 28 U. S. C. A., Section 2410.

The jurisdiction of this Court is invoked under Section 1291 of Title 28, U. S. C. A., and under the Act of August 15, 1894, as amended, 25 U. S. C. A., Section 345, providing that in cases under that Act the right of appeal shall be allowed to the parties as in other cases.

Statutes Involved.

Involved herein is the construction of the Act of August 15, 1894, as amended, 25 U. S. C. A., Section 345; the Act of June 25, 1910, as amended, 36 Stat. 855, 25 U. S. C. A., Sections 372 and 372a, and the Act of June 25, 1948, Ch. 646, 62 Stat. 934, 28 U. S. C. A., Section 1353.

Statement.

This action was brought by plaintiff Lee Arenas against the United States of America and Eleuteria Brown Arenas, also known as Della Nicholson, to obtain the following relief, to wit:

(1) That the trust patent issued by the United States of America to Eleuteria Brown Arenas for an undivided one-half interest in the lands allotted to Guadaloupe Arenas, the deceased wife of Lee Arenas, which lands were awarded to Lee Arenas by the judgment of the District Court on May 14, 1945, be declared null and void and that said patent be canceled;

(2) That plaintiff's equitable right and title to said lands be quieted against the United States of America and Eleuteria Brown Arenas, and each of them; and that the defendants, their agents, attorneys, and representatives be enjoined from interfering with the plaintiff's possession, use and enjoyment of said lands; and

(3) For general relief.

Plaintiff Lee Arenas is a person of Indian blood and descent, and is an enrolled member of the Agua Caliente Band of the Mission Indians of California, and has resided on the Reservation of said Band in Riverside County, California, at or near Palm Springs all of his life. Guadaloupe Arenas, his deceased wife, was also a member of said Band of Indians. She died intestate in 1937.

By the Act of March 3, 1917, Congress directed the Secretary of the Interior to cause allotments of land in severalty to be made to all of the Mission Indians of California. A Special Allotting Agent was appointed for that purpose in 1922. In 1923 said Special Allotting Agent completed and certified to a schedule of allotments to each and every member of the Agua Caliente Band of Mission Indians. This 1923 Schedule was disapproved in January, 1927, by the Secretary of the Interior, because the allotting agent had made selections for the members of the Band who had failed or refused to make voluntary selections for themselves. The Secretary directed the allotting agent to prepare another allotment schedule and to include therein only such Indians as should make selections of land for allotment for themselves and their minor children.

In May, 1927, the allotting agent completed and certified to another, and second, schedule which contained only the names of the members of the Band who had actually made selections for themselves and their minor children in accordance with the General Allotment Act of 1887 and instructions of the Secretary. This schedule contained, among others, the names and selections of Lee Arenas and his wife Guadaloupe, and also the name of Eleuteria Brown Arenas, also known as Della Nicholson, who had been taken into the home of Lee and Guadaloupe and remained with them for ten or more years. The United

States contends that Lee and Guadaloupe Arenas adopted Eleuteria according to tribal custom, which is denied by Lee Arenas and others—of which more later.

The schedule of 1927 was neither approved nor disapproved by the Secretary of the Interior for nearly twenty years after it was certified and transmitted to the Department by the Allotting Agent. (For a complete statement of the facts, see this Court's opinion, by Judge Garrecht, in *United States v. Arenas,* 158 F. 2d 730.)

In 1940 Lee Arenas filed an action in the District Court for the Southern District of California, Central Division, being No. 1321-O'C Civil, and entitled *Lee Arenas v. United States of America,* wherein he claimed to be entitled to the lands selected by him and Guadaloupe for allotment in 1927. He also claimed to be entitled to the lands selected in 1923 for his father and brother. Action No. 1321-O'C Civil was tried and a judgment was entered awarding the lands selected by Lee and Guadaloupe and for his father and brother to him, the said Lee Arenas. The complaint in said action alleged, among other things:

> "That thereafter, on the 26th day of March, 1927 (1937, as later found), the said Guadaloupe Arenas died, leaving plaintiff as her sole heir at law and next of kin * * *."

A similar allegation was made as to Francisco and Simon Arenas, father and brother, respectively, of Lee Arenas.

The judgment and decree in said case adjudged and decreed:

> "That plaintiff, Lee Arenas, is now the sole surviving heir at law and next of kin of each of the three above named decedents (*i. e.,* Guadaloupe, Francisco, and Simon Arenas) and as such heir at law is en-

titled, under the laws of descent and distribution of California, to succeed to the estate of each of said decedents * * *.

"That the plaintiff, Lee Arenas, is entitled to a trust patent for each and every of the above described allotments provided for in Section 5 of the said Act of January 12, 1891 (26 Stat. L. 712-714—the Mission Indian Act), the patents and each of them to be effective as of June 21, 1923, this being the date upon which the period of restriction on alienation prescribed therein shall begin to run." [Tr. of Rec. pp. 41, 95. Case No. 11195 in this Court.]

The United States of America appealed to this Court from said judgment. In the lengthy opinion of the Court, prepared by Judge Garrecht, the judgment below was affirmed in all respects, save one, as to the allotments of Lee Arenas and Guadaloupe Arenas. The exception was that the trust period as to said allotments should begin to run on and from May 9, 1927. The judgment was reversed as to the allotments to Francisco and Simon Arenas because they died before the 1927 allotment proceedings.

This Court said in its opinion in said case:

"We therefore hold that the appellee (Lee Arenas) has inherited Guadaloupe's equitable rights under her certificate of selection for allotment and the inclusion of her name in the 1927 schedule."

The decree of this Court adjudged, in this connection:

"* * * that portion of the judgment of the said District Court in this cause, which holds that the appellee is entitled to a trust patent for his allotment and for that of his wife Guadaloupe, to be effective as of June 21, 1923, is modified so as to make the effective date May 9, 1927, and, as so modified,

that portion of the judgment be, and hereby is affirmed * * *."

It thus appears that this Court affirmed the judgment of the District Court in all respects, save the one exception set forth therein, as to the allotments of Lee and Guadaloupe Arenas. (Certiorari was denied by the Supreme Court, 331 U. S. 842.)

After certiorari was denied by the Supreme Court a copy of the judgment, as affirmed, properly certified, was duly transmitted to the Secretary of the Interior, as provided by 25 U. S. C. A., Section 345.

Notwithstanding the judicial determination that Lee Arenas was the sole heir at law and next of kin of his deceased wife, Guadaloupe Arenas, and as such entitled to the lands selected by her for allotment in 1927, the United States of America, acting through its Examiner of Inheritance, on or about July 25, 1949, issued an order purporting to declare and adjudge that the heirs at law and next of kin of Guadaloupe Arenas were, and are, Lee Arenas and Eleuteria Brown Arenas, and that said persons are entitled to share equally in the allotted lands of Guadaloupe Arenas. [See Deft. Ex. "A," being a transcript of the proceedings before said Examiner of Inheritance.]

On or about November 8, 1949, the United States issued a purported trust patent to Eleuteria Brown Arenas declaring that she is the owner of an undivided one-half interest in the lands of Guadaloupe Arenas.

The present suit followed, for the purposes already stated.

The judgment of the trial court in this case is based exclusively upon the proposition that the order of the Examiner of Inheritance [Deft. Ex. "A"] is *res judicata* as to the heirs of Guadaloupe Arenas. Said order reads, in part, as follows:

> "Now, Therefore, by virtue of the power and authority vested in the Secretary of the Interior by section 1 of the Act of June 25, 1910 (36 Stat. 855), and other applicable statutes, and pursuant to Departmental Regulations of May 29, 1947, delegating probate authority to the Examiners on Inheritance, I hereby find, adjudge, and declare that at the date of the above-mentioned hearing the heirs of said decedent, *determined in accordance with the laws of the State of California,* and their respective shares in decedent's estate were: Della Brown Nicholson (Eleuteria Brown Arenas) daughter (*adopted by decedent in accordance with established Indian Tribal Custom*), ½, Lee Arenas, husband, ½." (Italics ours.)

It will be noted that the order states that the determination of heirship was made by the Examiner (1) "in accordance with the laws of the State of California" and (2) that Eleuteria is Guadaloupe's daughter "adopted by decedent in accordance with established Indian Tribal Custom." The two quoted statements not only contradict each other, but are factually false. The determination was *not* made in accordance with the laws of California, nor was Eleuteria adopted by Guadaloupe in accordance with established Tribal Custom. Transcript of the proceedings held by the Examiner may be treated as a judgment roll, and it does not warrant either of said statements, *supra.*

Questions Involved.

The questions involved on this appeal are almost fully stated in appellant's Statement of Points on Appeal, and may be repeated here for convenience:

1. The Court erred in finding, concluding and adjudicating that the District Court, and on appeal the United States Court of Appeals for the Ninth Circuit, in Case No. 1321-O'C Civil, entitled "Lee Arenas, Plaintiff, vs. United States of America, Defendant," did not have jurisdiction to determine the right of Lee Arenas to a trust patent to the lands selected by his deceased wife, Guadaloupe Arenas, for allotment in severalty.

2. The Court erred in finding, concluding and adjudicating that the judgment of the District Court in Case No. 1321-O'C Civil, entitled "Lee Arenas, Plaintiff, vs. United States of America, Defendant," as affirmed by the United States Court of Appeals for the Ninth Circuit (certiorari denied by the Supreme Court, 331 U. S. 842, 67 S. Ct. 1531), is a nullity and void *ab initio* in so far as said judgment adjudicates the right of the said Lee Arenas to a trust patent covering the lands selected for allotment in severalty by Guadaloupe Arenas, the deceased wife of Lee Arenas.

3. The Court erred in finding, concluding and adjudicating that the said judgment entered in said Action No. 1321-O'C, as affirmed, may be collaterally attacked and impeached in another action after said judgment had been affirmed and had become final.

4. The Court erred in finding, concluding and adjudicating that Eleuteria Brown Arenas, also known as Della Nicholson, was adopted by Guadaloupe Arenas in accordance with established Indian Tribal Custom.

5. The Court erred in finding, concluding and adjudicating that the evidence introduced and received in the so-

called heirship proceedings conducted by and before J. Lee Rawhauser, Examiner of Inheritance, on or about June 8, 1949, is sufficient to show that Eleuteria Brown Arenas, also known as Della Nicholson, was adopted by Guadaloupe Arenas in accordance with established Indian Tribal Custom, or otherwise.

6. The Court erred in finding, concluding and adjudicating that the decision of J. Lee Rawhauser, Examiner of Inheritance, in said heirship proceeding is final and *res judicata* as to Lee Arenas, or binding upon him in view of the final judgment, as affirmed, in said Action No. 1321-O'C Civil, certiorari denied, 331 U. S. 842.

7. The Court erred in adjudging that Eleuteria Brown Arenas, also known as Della Nicholson, is entitled to a trust patent to one-half of the lands allotted in severalty to Lee Arenas as the sole heir at law of his deceased wife, Guadaloupe Arenas, by the former judgment of the District Court.

8. The Court erred in granting an injunction restraining plaintiff Lee Arenas from using and enjoying the lands allotted to him as heir at law of Guadaloupe Arenas by the former judgment of the District Court in Action No. 1321-O'C Civil.

9. The judgment of the Court is not supported by the evidence.

10. The decision of the Examiner of Inheritance that Guadaloupe Arenas adopted Eleuteria Brown Arenas, also known as Della Nicholson, is not supported by any competent material evidence.

11. The Court erred in finding, concluding and adjudicating that said determination of heirship was made by the Examiner of Inheritance in accordance with the laws of the State of California.

ARGUMENT.

I.

The District Court Had Jurisdiction to Determine the Right of Lee Arenas to the Lands Allotted to His Wife Guadaloupe Arenas, and to Decide Every Question Relating to Such Right.

It is too well settled to require citation of authority that the District Court has jurisdiction and power to determine the right of any person of Indian blood or descent to an allotment of land in severalty.

25 U. S. C. A., Sec. 345;

28 U. S. C. A., Sec. 1353.

It should again be noted that the question of the District Court's jurisdiction to decide the right of Lee Arenas to his deceased wife's lands, which she had selected for allotment, was squarely presented by the complaint in Action No. 1321-O'C Civil in said court. At no stage of the proceedings had in that case did the United States challenge, or even remotely question, the jurisdiction of the District Court to determine that Lee Arenas, *as the sole heir at law and next of kin of his deceased wife,* was entitled to the lands selected by her for allotment in severalty and a trust patent thereto. On appeal to this Court, no question was raised as to the District Court's jurisdiction, and this Court expressly affirmed the judgment adjudging that Lee Arenas was the sole heir at law and next of kin of Guadaloupe and as such entitled to a trust patent to her lands. And, again, no question of jurisdiction was raised by the United States in its petition for certiorari filed in the Supreme Court of the United States.

It has long been settled law that where a court, and especially a court of equity, has jurisdiction of the parties and subject matter of an action, it has the right and power to decide every question which necessarily occurs in the cause; and whether its decision be correct or otherwise its judgment, unless reversed, is regarded as binding upon the parties in every other court.

Peck v. Jenness, 48 U. S. 612, 12 L. Ed. 841;

Hollingsworth v. Barbour, 29 U. S. 466, 7 L. Ed. 922;

Barnett v. Mayes, 43 F. 2d 521, 527;

Hoffman v. McClelland, 264 U. S. 552, 558;

Hartford Acc. & Indem. Co. v. So. Pac. Co., 273 U. S. 207;

Minneman v. Fed. Land Bank, 105 F. 2d 263;

35 C. J. S. 790, Sec. 11 of Federal Courts, and cases cited.

The principle stated, *supra,* is especially applicable in suits in equity, such as are contemplated under 25 U. S. C. A., Section 345, and 28 U. S. C. A., Section 1353.

The rule is of ancient origin. It seems to have been first applied by the Supreme Court in *Diggs v. Walcott,* 4 Cranch. 119. Later (in 1849) in *Peck v. Jenness,* 48 U. S. 612, 12 L. Ed. 841, the Court explicitly stated the rule as follows:

> "It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the

right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court."

Almost one hundred years later, in *Hartford Accident & Indmenity Co. v. Southern Pac. Co.,* 273 U. S. 207, the Court said, at pages 217-218:

> "Where a court of equity has obtained jurisdiction over some portion of a controversy, it may, and will in general, proceed to decide the whole issues and award complete relief, even where the rights of parties are strictly legal, and the final remedy granted is of the kind which might be conferred by a court of law. Pomeroy's Equity Jurisprudence (4th Ed.), Sections 181 and 231; United States v. Union Pacific Railway Company, 160 U. S. 1, 52, 16 S. Ct. 190, 40 L. Ed. 319. See, also, equity rule 10, amended May 4, 1925, 268 U. S. 709, appendix."

In *Minneman v. Federal Land Bank,* 105 F. 2d 363 (1939), the Court quoted approvingly the following language from *Hollingworth v. Barbour,* 4 Peters 466, 471, 7 L. Ed. 922 (1830):

> "The principle is too well settled, and too plain to be controverted, that a judgment or decree pronounced by competent tribunal, against a party having actual or constructive notice of the pendency of the suit, is to be regarded by every other co-ordinate tribunal; and that if the judgment or decree be erroneous, the error can be corrected only by a superior appellate tribunal. The leading distinction is between judgments and decrees merely void, and such as are voidable only; the former are binding nowhere; the latter everywhere, until reversed by a superior authority."

A composite statement of the rule, drawn from most, if not all, of the federal decisions on the subject, is found in 35 C. J. S. 790, Section 11 of the title "Federal Courts," as follows:

> "Where a federal court has properly acquired jurisdiction, it has the right, power, and authority to decide and determine the entire controversy and all the issues and questions involved in the case; and, at least in equity, it may retain and exercise jurisdiction for the purpose of doing complete justice between the parties and awarding relief as full and complete as the circumstances of the case and the nature of the proof may require. Jurisdiction, once acquired, will not be ousted by a subsequent change in the condition of the parties; it lasts until the court finishes with all parts of the controversy; and it is not exhausted by the rendition of a judgment, but continues until the judgment is satisfied."

The federal decisions clearly hold that a judgment not appealed from, or not set aside on appeal, is effective as an estoppel upon the points decided, whether the decision be right or wrong.

Reed v. Allen, 286 U. S. 191, 52 S. Ct. 532;

Baltimore S. S. Co. v. Phillips, 274 U. S. 316, 47 S. Ct. 600;

North Carolina R. Co. v. Story, 268 U. S. 288, 45 S. Ct. 531;

Mo. Pac. R. Co. v. Ault, 256 U. S. 554, 41 S. Ct. 593;

North Carolina R. Co. v. Lee, 260 U. S. 16, 43 S. Ct. 2.

In *Reed v. Allen,* 286 U. S. 191, 52 S. Ct. 532, *supra,* the Court reviewed numerous cases on the point, and then said (286 U. S. 201):

> "These decisions constitute applications of the general and well-settled rule that a judgment not set aside on appeal or otherwise, is equally effective as an estoppel upon the points decided, whether the decision be right or wrong. Cornett v. Williams, 20 Wall. 226, 249, 250, 22 L. Ed. 254; Wilson v. Deen, 121 U. S. 525, 534, 7 S. Ct. 1004, 30 L. Ed. 980; Chicago, R. I. & P. R. Co. v. Schendel, 270 U. S. 611, 617, 46 S. Ct. 420, 70 L. Ed. 757, 53 A. L. R. 1265. The indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert."

The other cases above cited are to like effect.

Where the United States is a party to a suit involving Indian lands, or where it is not a formal party but has counsel of its choice to actively aid in the conduct of the litigation, it is concluded by the judgment rendered therein.

> *Drummond v. United States,* 324 U. S. 316, 65 S. Ct. 659, 660;
>
> *United States v. Candelaria,* 271 U. S. 432, 46 S. Ct. 561, 564;
>
> *Souffront v. Compagnie,* 217 U. S. 475, 30 S. Ct. 608;
>
> *Lovejoy v. Murray,* 3 Wall. 1, 18, 18 L. Ed. 129, and other federal cases.

One of the principal issues in action No. 1321-O'C Civil (No. 11195 in this Court) was whether Lee Arenas

was entitled as sole heir at law of Guadaloupe Arenas to her allotment of lands in severalty. The United States offered no objection to the jurisdiction of the District Court, nor any defense based upon want of jurisdiction, to decide that issue. Indeed, in its opening brief in said case in this Court the United States expressly said, under the heading "Jurisdiction," pages 1-2, *id.*:

> "The jurisdiction of the district court was invoked under the Act of August 15, 1894, as amended, 28 Stat. 286, 305, 25 U. S. C. A., Sec. 345, which authorizes Indians who are claiming allotments to prosecute suits therefor in the proper district court of the United States and gives such courts jurisdiction of such suits * * * providing that, in such cases under that Act, the right of appeal shall be allowed to the parties as in other cases."

Under the overwhelming weight of authority, the United States is bound by the final judgment and decree in that suit, and said judgment and decree is *res judicata* on the question of the right of Lee Arenas to the lands selected by Guadaloupe for allotment.

The point under discussion is thus stated in 50 C. J. S., pages 102-103:

> "A judgment on the merits, rendered in a former suit between the same parties or their privies, on the same cause of action, by a court of competent jurisdiction, operates as a bar not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action. In other words, he must present his whole case, extending his claim so as to embrace everything which properly constituted a part of his cause of action or defense * * *."

To the same effect, See *Grubb v. Public Utilities Comm.,* 281 U. S. 470; *Baltimore S. S. Co. v. Phillips,* 274 U. S. 316, and numerous cases cited in note 16 of the text of 50 C. J. S. 102-103, *supra.* Also, 30 Am. Jur. 912; Restatement, Judgments, Sec. 63; Freeman on Judgments (5th Ed), pages 1417, 1432.

The authorities cited, *supra,* should be considered in connection with the fact that at all times during the litigation in Case No. 1321-O'C Civil the United States was the trustee of Eleuteria Brown Arenas, and as such representing her interests. In a large, and we believe controlling, sense she, the said Eleuteria Brown Arenas, by virtue of privity, is likewise bound through her trustee.

II.

The Judgment in Lee Arenas v. United States, No. 1321 O'C Civil in the District Court, Cannot Be Collaterally Attacked, as Here, for Want of Jurisdiction.

The District Court based its judgment on its asserted lack of jurisdiction in Case No. 1321 O'C Civil to determine whether Lee Arenas was entitled as sole heir at law to the lands allotted to Guadaloupe Arenas. The judgment followed the contention of the United States that said Court could not determine that matter because of lack of jurisdiction, despite the fact that the District Court, this Court, and by denial of certiorari the United States Supreme Court, had decided that the District Court had jurisdiction in said case, to decide each and

every issue presented therein. Undoubtedly, the District Court had jurisdiction of the subject matter (the claim of Lee Arenas to allotments) and the parties.

It must be noted that whether Lee Arenas was the sole heir at law of Guadaloupe Arenas was a question incidental to the establishment of his claim to her allotment, hence necessary to the decision of the case. A court of equity has jurisdiction and power to decide any issue or question necessary to grant equitable relief.

35 C. J. S. 790, and cases cited.

The rule of law invoked by the appellees is not without exception, as is shown by numerous decisions of the federal courts.

Des Moines Nav. Co. v. Iowa Homestead Co., 123 U. S. 552, 8 S. Ct. 217;

Dowell v. Applegate, 152 U. S. 327, 14 S. Ct. 611;

Nye v. United States (4 Cir.), 137 F. 2d 73, 77;

Windhalz v. Everett (4 Cir.), 74 F. 2d 834;

Stoll v. Gottlieb, 305 U. S. 165, 59 S. Ct. 134.

In *Des Moines Nav. Co. v. Iowa Homestead Co.* (1887), 123 U. S. 552, 8 S. Ct. 217, *supra,* plaintiff corporation sued another corporation, a resident of the same state, and also sued non-resident defendants who removed the cause to the United States Court. All defendants answered without objection to the court's jurisdiction, the case was tried and judgment was entered without objection to the jurisdiction. The case was appealed to the Supreme Court of the United States and there decided

without objection being made to jurisdiction. In a later case, in the Iowa state court, between some of the parties to the former suit, the judgment in the former case was pleaded as *res judicata.* To this plea, the other party asserted that the former judgment was of no binding force and effect and void for want of jurisdiction of all courts rendering it. Upon this question, the Supreme Court said (8 S. Ct. 220):

> "Here, it is claimed that the record shows there could be no jurisdiction, because it appears affirmatively that the navigation and railroad company, one of the defendants, was a citizen of the same state with the plaintiff. But the record shows, with equal distinctness, that all the parties were actually before the court, and made no objection to its jurisdiction * * *. Whether in such a case the suit could be removed was a question for the circuit court to decide when it was called on to take jurisdiction. If it kept the case when it ought to have been remanded, or if it proceeded to adjudicate upon matters in dispute between two citizens of Iowa, when it ought to have confined itself to those between the citizens of Iowa and the citizens of New York, its final decree in the suit could have been reversed, on appeal, as erroneous, but the decree would not have been a nullity. To determine whether the suit was removable in whole or in part or not, was certainly within the power of the circuit court. The decision of that question was the exercise, and the rightful exercise, of jurisdiction, no matter whether in favor of or against taking the cause. Whether its decision was

right, in this or any other respect, was to be finally determined by this court on appeal. As the circuit court entertained the suit, and this court, on appeal, impliedly recognized its right to do so, and proceeded to dispose of the case finally on its merits, certainly our decree cannot, in the light of prior adjudications on the same general question, be deemed a nullity. It was, at the time of the trial of the present case in the court below, a valid and subsisting prior adjudication of the matters in controversy, binding on these parties, and a bar to this action."

In *Nye v. United States* (4 Cir.), 137 F. 2d 73, the Court, by Judge Parker, said at page 77:

"Whether the suit was or was not one of which the court had jurisdiction, there was certainly power in the court to determine the question of jurisdiction; and even if there was lack of jurisdiction, it is well settled that a judgment based on an erroneous assumption of jurisdiction would not have been void or subject to collateral attack. *Windholz v. Everett,* 4 Cir., 74 F. 2d 834; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.,* 123 U. S. 552, 557, 8 S. Ct. 217, 31 L. Ed. 202; *Dowell v. Applegate,* 152 U. S. 327, 14 S. Ct. 611, 38 L. Ed. 463."

In *Stoll v. Gottlieb,* 305 U. S. 165, 59 S. Ct. 134, the Court said:

"* * * where the judgment or decree of the Federal Court determines a right under a Federal Statute, that decision is 'final until reversed in an appellate court, or modified or set aside in the court

of its rendition.' (p. 170) * * *. Every court in rendering judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter. An erroneous affirmative conclusion as to the jurisdiction does not in any proper sense enlarge the jurisdiction of the court until passed upon by the court of last resort, and even then the jurisdiction becomes enlarged only from the necessity of having a judicial determination of the jurisdiction over the subject matter. When an erroneous judgment, whether from the court of first instance or from the court of final resort, is pleaded in another court or another jurisdiction the question is whether the former judgment is *res judicata*. After a Federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact. We see no reason why a court in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation." (P. 172.)

The foregoing cases are decisive of the point under consideration. It is manifest that the District Court erred in holding that, after the former case ran its course in the District Court, the Circuit Court of Appeals, and the Supreme Court without objection to the jurisdiction therein asserted, the United States can now collaterally attack the judgment rendered in said case for want of jurisdiction.

III.

The District Court Erred in Holding That the Finding of the Examiner of Inheritance That Eleuteria Brown Arenas Was Adopted by Guadaloupe Arenas in Accordance With the Laws of the State of California and in Accordance With Established Indian Tribal Custom Is Res Judicata of the Issues in the Pending Suit.

As already noted, the judgment of the District Court rests exclusively upon the propositions: (1) That it had no jurisdiction in Action No. 1321 O'C Civil to decide the incidental question involved therein whether Lee Arenas was the sole heir at law of his deceased wife Guadaloupe; (2) that having no jurisdiction to decide that issue its judgment was void *ab initio;* and (3) that since its said judgment was void *ab initio,* the finding of the Examiner of Inheritance was properly made and is, therefore, *res judicata* in the pending suit.

Obviously, the learned District Court did not give adequate, if any, consideration to the principles of law discussed under Points I and II, *ante,* to wit:

(1) That the District Court had jurisdiction to determine the right of Lee Arenas to the allotment of his wife Guadaloupe and to decide every question incidental or relating to such right; and

(2) That the judgment in the former case, affirmed by this Court and, impliedly, by the United States Supreme Court, cannot be collaterally attacked in the instant action for want of jurisdiction.

The transcript of the proceedings before the Examiner of Inheritance [Deft. Ex. "A"] may be treated here as a judgment roll. The Examiner's "Order Determining

Heirs" of Guadaloupe Arenas specifically states that his finding of heirship was "determined in accordance with the laws of the State of California" and that Della Brown Nicholson (Eleuteria Brown Arenas) was "adopted by decedent in accordance with established Indian Tribal Custom." These two findings are demonstrably untrue, as shown by the judgment roll itself.

A. Eleuteria Brown Arenas Was Not Adopted by Guadaloupe Arenas in Accordance With the Laws of the State of California.

It may first be noted that the only method by which an adult Mission Indian of California may adopt a minor child is in accordance with the laws of the State of California. This is made absolutely clear by the pertinent provisions of the General Allotment Act of February 8, 1887, 25 U. S. C. A., Section 348, and by the provisions of the Mission Indian Act of January 12, 1891, 26 Stat. 712.

The General Allotment Act, as codified in Title 25 U. S. C. A., Section 348, provides in this connection:

> "Upon the approval of the allotments * * * he (the Secretary) shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, *in case of his decease, of his heirs according to the law of the State or Territory where such land is located* * * *." (Italics ours.)

The Mission Indian Act of January 12, 1891, 26 Stat. 712, is to the same effect. Since it applies exclusively to

the Mission Indians of California, its provisions as to heirship are controlling as to members of the Agua Caliente Band of said Indians. Section 5 thereof provides:

> "That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, *or, in the case of his decease, of his heirs according to the laws of the State of California* * * *." (Italics ours.)

It follows from the foregoing statutes that if Eleuteria Brown Arenas was adopted by Guadaloupe, such adoption must have been made "in accordance with the laws of the State of California," and if not so made there was no legal adoption by virtue of which Eleuteria could inherit from Guadaloupe.

There is no provision in California law for the adoption of a minor child "in accordance with established Indian Tribal Custom." The Code provisions relating to adoption are found in Sections 221-230 of the California Civil Code, and these provisions are exclusive. Any minor child may be adopted by any adult person, under conditions prescribed (*id.,* Sec. 221), but not without the consent of the living parents, if any (*id.,* Sec. 224) and also consent of the child, if more than 12 years old (*id.,* Sec. 225).

> "Any person desiring to adopt a child may for that purpose petition the superior court of the county in which the petitioner resides and the clerk of the

court shall immediately notify the State Department of Social Welfare at Sacramento in writing of the pendency of the action." (Civ. Code, Sec. 226.)

"The person or persons desiring to adopt a child, and the child proposed to be adopted, must appear before the court. The court must examine all persons appearing before it pursuant to this section, each separately * * *." (*Id.*, Sec. 227.)

Other provisions of the Civil Code sections mentioned also show that before there can be any adoption the strict provisions of the statute (Civ. Code, Secs. 221-230) must be followed.

The judgment roll of the proceedings before the Examiner of Inheritance [Deft. Ex. "A"] shows on its face that the alleged adoption was not in accordance with the laws of California relating to adoption. Indeed, the judgment roll affirmatively states that Guadaloupe adopted Eleuteria "in accordance with established Indian Tribal Custom," thus negativing the finding that the alleged determination was in accordance with the laws of California.

It should be noted that Eleuteria's father was living at the time of the alleged adoption, and that his consent thereto does not appear in the record.

The fact that Eleuteria was taken into the home of Lee and Guadaloupe Arenas and that she lived there for a number of years creates no presumption that she was adopted by them.

Romero Estate, 75 Cal. 279;

Parshall v. Parshall, 56 Cal. App. 553;

McCombs Estate, 174 Cal. 211.

In *McCombs Estate, supra,* the Court said, at page 214:

> "To establish the child's right to inherit from the person claimed as an adopting parent, there must be proof of an act of adoption done in strict accordance with the statute. (*Ex parte Clarke,* 87 Cal. 638-641 (25 Pac. 967).) * * *
>
> "The burden of proof is upon her to convince the court of her standing as an adopted child. Proof that she lived with the McCombs and had been treated as a child was not sufficient. (Citing cases.)"

To the same effect, see other cases above cited; I Corpus Juris 1394, Sec. 116; 2 C. J. S. 444, Sec. 52.

The finding of the Examiner that Eleuteria is the adopted child of Guadaloupe in accordance with the laws of the State of California has not an iota of evidence to sustain it; and such finding is directly opposed to the other finding that she was adopted in accordance with established Indian Tribal Custom.

B. Eleuteria Brown Arenas Was Not Adopted by Guadaloupe Arenas in Accordance With Established, or Any, Indian Tribal Custom.

Examination of the judgment roll [Deft. Ex. "A"] shows affirmatively that the Agua Caliente Band of Mission Indians, for more than 50 years, has had no tribal custom for the adoption of any child not of the blood, or not adopted according to law by a member of the tribe. [See affidavits of Clemente P. Segundo and Lee Arenas, part of the judgment roll.] There is no evidence to the contrary. Both Clemente P. Segundo and Lee Arenas have been and are members of the Agua Caliente Band and both have been many times members of the Tribal Business Committee of the Band, hence familiar with

the by-laws, customs, practices, usages and habits of said Band of Indians.

The finding of the Examiner that Eleuteria was adopted by Guadaloupe in accordance with established Indian Tribal Custom is not supported by evidence that any such custom existed, and was an erroneous conclusion of law.

The evidence adduced before, and by, the Examiner of Inheritance makes no reference to any time, place, or tribunal before which Eleuteria was adopted. It refers to no tribal or other records. It consists of hearsay statements, or the inferences or conclusions of a few persons, but nowhere is any fact shown sufficient to warrant the inference that Guadaloupe ever had any intention of adopting Eleuteria. The judgment roll shows that the following testimony was introduced by the Examiner, which is summarized as follows:

Excerpts from the testimony of Henry Pablo, John Mack Razon, Bartezel Rice and Victoria Weirick, taken in 1940 and 1942 in determining the heirs of Rufina Rice, were introduced. Henry Pablo stated that Guadaloupe Arenas had no children of her own "but she adopted a child." John Mack Razon stated that Lee and Guadaloupe had no children of their own "but they adopted a daughter." Bartezel Rice stated that Guadaloupe "reared Della Brown * * * but I can't say of my own knowledge whether the child was adopted in accordance with Tribal Custom or not." Victoria Weirick stated, "I have always understood that she adopted Della Brown but I cannot say for sure that the adoption took place." Other witnesses were Ambrose Gabriel, Loreno Lugo, and Eleuteria herself. Ambrose Gabriel stated that he "saw Lupe and Lee Arenas taking care of her." The Examiner

asked him if *in his opinion* Eleuteria was adopted, to which he said, "Yes, I think so." Loreno Lugo stated, "I have always *looked upon* Della Brown Nicholson as the adopted daughter of Guadaloupe" and the people around here *regarded* Della as their adopted child, by Indian Custom."

There is not one word of positive, credible evidence (1) that there was a tribal custom for the adoption of a child, or (2) that Guadaloupe adopted, or ever intended to adopt, Eleuteria.

Lee Arenas testified at the hearing before the Examiner:

> "Q. Did she (Guadaloupe) adopt a child? A. No.
>
> Q. Didn't you and Lupe Arenas adopt Della Brown Nicholson, who was also known as Eleuteria, by Indian Custom, when she was a little girl? A. No, we didn't.
>
> Q. When you took Della into your home back in 1917, was it not your intention to rear her as your adopted daughter? A. No, we just took her in and cared for her because she had no mother and her father, Pete Brown, was unable to care for her."

Clemente P. Segundo stated in his affidavit:

> "Affiant further states that said Della Brown was enrolled as a member of said tribe of Indians because of her residence in the home of Lee Arenas upon said reservation and of her Indian blood (in another Band) and not because she was ever at any time adopted or recognized by said Guadaloupe Arenas, in any manner, or entitled to inherit any property of said Guadaloupe Arenas."

Eleuteria was in the home of Lee and Guadaloupe Arenas for about ten years. She then returned to the home of her father Pete Brown and remained there until she married Nicholson. The judgment roll does not sus-

tain the finding of the Examiner that Eleuteria was adopted by Guadaloupe in accordance with Tribal Custom, even if such custom had been shown to exist. All of the affirmative evidence on the question is to the effect that there was no such tribal custom; and if there had been, it could not have superseded the Acts of Congress and the laws of the State of California to the contrary.

C. Any Determination of Heirship by the Secretary of the Interior Under 25 U. S. C. A., Section 372, Is Subject to Attack or Review on Account of Fraud, or for Error of Law Upon the Facts Found, or Where There Is No Evidence to Support His Finding on a Material Issue in the Proceeding.

Lee Arenas is not in any sense bound by the finding and so-called adjudication of the Examiner of Inheritance that Eleuteria was adopted by Guadaloupe. Such finding and adjudication are under direct attack in the instant case, and the validity thereof is expressly challenged by the allegations of the complaint. All of which means that Lee Arenas is not bound by any rules of administrative procedure ordinarily applicable to matters adjudicated by some administrative body or officer.

Dixon v. Cox, 268 Fed. 285 (8th Cir.);

Frederick v. Rock Island Sav. Bank, 44 S. D. 477, 184 N. W. 234;

Maz-Ke v. Jefferson Trust Co., 82 Okla. 107, 198 Pac. 319;

Hanson v. Hoffman, 113 F. 2d 780;

Cf. James v. Germania Iron Co., 107 Fed. 507, 600-601;

Howe v. Parker, 190 Fed. 738, 746.

The decision of the Circuit Court of Appeals for the Eighth Circuit in *Dixon v. Cox,* 268 Fed. 285, *supra,* is

directly in point. The opinion of the Court, by Judge Sanborn, states at pages 289-290:

> "The second question is: Did the complaint or proof in this suit set forth a cause of action in equity to avoid the Secretary's decision for fraud, error of law, or absence of substantial evidence to sustain it? Whether or not the weight of evidence in substantial conflict sustains one or the other side of an issue of fact is a question upon which the final decision of the Secretary in a case of this character is generally final and conclusive; but his decision upon this issue of heirship, like the decision of the Land Department, of the Dawes Commission, and of other *quasi* judicial tribunals, may undoubtedly be avoided by a suit in a court of equity on account of fraud which induced it, on account of error of law upon facts found, conceded, or established beyond dispute at the hearing before him, or on the ground that at the close of such hearing there was no evidence to support his finding on a material issue of fact which controlled the result. *James v. Germania Iron Company,* 107 Fed. 587, 600, 601, 46 C. C. A. 476, 479, 480; *Howe v. Parker,* 190 Fed. 738, 746, 111 C. C. A. 466, 474."

The Act of June 25, 1910, 25 U. S. C. A., Section 372, was involved in the case, and the above quoted language related to said Act.

The Examiner's Order Determining Heirs of Guadaloupe Rice Arenas is contrary to law and there is no evidence to support his finding that Eleuteria was adopted by Guadaloupe either under the laws of California or by tribal custom. The Order comes squarely within the interdiction set forth in *Dixon v. Cox,* and is void on the face of the judgment roll [Deft. Ex. "A"].

IV.

The Act of June 25, 1910 (25 U. S. C. A. Sec. 372) Is Not Applicable in This Case, Because the Authority of the Secretary of the Interior to Determine Heirship Under Said Act Is Limited to Cases Where an Allotment Was Made and a Trust Patent Was Issued to the Indian During His Lifetime and Who Died During the Trust Period.

The District Court erroneously held that it had no jurisdiction to decide the incidental, but necessary, question involved in the former action No. 1321-O'C Civil, to wit, whether Lee Arenas, plaintiff therein, could maintain the action, as the sole heir at law of his deceased wife Guadaloupe, to establish his right to the lands selected by her for allotment during her lifetime. Under the facts stated below, we submit that the Court had jurisdiction to decide that question, nothwithstanding the provisions of the heirship statute (Act of June 25, 1910, 25 U. S. C. A., Sec. 372).

In 1927 Guadaloupe Arenas made and filed with the Special Allotting Agent her selection of lands for allotment in severalty to her. On May 9, 1927, the Allotting Agent made, certified and transmitted a schedule of allotments selected by members of the Agua Caliente Band of Mission Indians to the Secretary of the Interior. The Secretary took no action on said schedule until after the decision of the Supreme Court in *Arenas v. United States* (1944), 322 U. S. 419. Some months thereafter he pretended to disapproved the 1927 schedule. Guadaloupe Arenas died in March, 1937, intestate, at which time no allotment had been made to her and, of course, no trust patent had been issued to her. In 1940 Lee Arenas filed

Action No. 1321-O'C Civil in the District Court claiming to be entitled to allotments of land for himself and as the sole heir at law of Guadaloupe. In that case, without objection to the jurisdiction, the District Court made and entered its decree adjudging that Lee Arenas was entitled to the lands selected by him and Guadaloupe in 1927 and to trust patents covering said lands. (60 Fed. Supp. 411.) This Court affirmed, except it held that the trust period should begin to run on and from May 9, 1927. (158 F. 2d 730.) The Supreme Court denied certiorari. (331 U. S. 842.) On July 25, 1949—more than 12 years after Guadaloupe's death, and more than 2 years after the Supreme Court denied certiorari in case No. 1321-O'C Civil—the Examiner of Inheritance pretended to make a determination as to the heirs of Guadaloupe Arenas, and by so doing to nullify the solemn judgments of the District Court, this Court and the Supreme Court. Aside from the obvious lack of *bona fides* on the part of the Department, no such power is granted the Secretary by the Act of June 25, 1910. (See Points I, II and III, *ante*.) We believe that the authorities do not justify the judgment of the District Court holding that it could not determine the heirs at law of Guadaloupe Arenas in action No. 1321-O'C Civil.

The Act of June 25, 1910.

The Act of June 25, 1910, expressly limits the authority of the Secretary to determine heirship. Section 1 of the Act (25 U. S. C. A., Sec. 372) provides:

> "When any Indian to whom an allotment has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will

> disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive."

At the date of Guadaloupe's death in 1937 no allotment had been made to her. It is, therefore, clear that she was not in the class of Indians mentioned in the Act of 1910, for at the date of her death no allotment of land had been made to her. The allotment to Lee as her sole heir at law was made by the decree of this Court years after her death.

The distinction between this case and the case contemplated by the Act of June 25, 1910, may be stated as follows: In an action to secure an allotment which has been unlawfully denied to an Indian, the District Court has exclusive jurisdiction of the subject matter and parties to the suit under 25 U. S. C. A., Section 345; in a proceeding to determine the heirs of a deceased Indian, to whom the Secretary has issued a trust patent during the Indian's lifetime, the Secretary has exclusive jurisdiction under 25 U. S. C. A., Section 372.

The distinction just stated has been recognized, expressly or impliedly, by the federal courts. Most of the cases relate to the exclusiveness of the Secretary's jurisdiction to determine heirship where Indians had received their allotments and trust patents; these are not in point, and need not be discussed. Other cases draw the distinction mentioned; these are important here.

In *Gerard v. United States,* 167 F. 2d 951 (9th Cir., 1948), the Court said, at page 953:

> "The Act of 1901" (codified in 25 U. S. C. A., Sec. 345) "further has provided for suits by Indians

where the Indian wards are 'excluded from * * * any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress'. * * * As to litigation concerning the two classes, claims to allotments to be made and to land already allotted and held under trust patents, the Act's provisions are that the Indians 'may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper circuit court of the United States.' 31 Stat. 760, 25 U. S. C. A., Section 345.

"The distinction between the provisions of the 1901 Act for suits concerning an Indian's right to an allotment in the first instance and provisions for suit where the trust patent has been issued is recognized in several cases. *Typical were cases brought by Indians to determine who are heirs to land already allotted to an Indian ancestor to whom a trust patent is issued. McKay v. Kalyton,* 204 U. S. 458, 27 S. Ct. 346, 51 L. Ed. 566; *Heckman v. United States,* 224 U. S. 413, 32 S. Ct. 424, 56 L. Ed. 820." (Italics ours.)

The same conclusion is reached in *First Moon v. White Tail,* 270 U. S. 243, 46 S. Ct. 246. After quoting the pertinent provisions of the Act of June 25, 1910, the Court said (46 S. Ct. 246):

"We cannot accept the suggestion that the above-quoted exclusive feature of the Act of 1910, was repealed by the Act of December 21, 1911, c. 5, 37 Stat. 46, which amended section 24, Judicial Code (Comp. St. Section 991), and conferred upon District Courts jurisdiction 'of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty.'

"This paragraph is but a codification of provisions found in the Act of August 15, 1894, c. 290, 28 Stat. 305, as amended by the Act of February 6, 1901, c. 217, 31 Stat. 760 (Comp. St. Sections 4214, 4215). *It has reference to original allotments claimed under some law or treaty, and not to disputes concerning the heirs of one who held a valid and unquestioned allotment.*" (Italics ours.)

The language of the Act of 1910 (25 U. S. C. A., Sec. 372) and the decisions noted, *supra,* leave no doubt upon the proposition that the Secretary's authority to determine heirship is limited to cases where the deceased Indian had received an allotment and trust patent thereto prior to decease.

The jurisdictional statute of August 15, 1894, as amended by the Act of 1901 (both carried into 25 U. S. C. A., Sec. 345), provides:

> *"All persons* * * * *of Indian blood or descent* who are entitled to an allotment of land * * *, who claim to be so entitled * * *, *or who claim to have been unlawfully denied or excluded from any allotment* * * * may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any (such) action * * *." (Italics ours.)

The Act of August 15, 1894, as amended (25 U. S. C. A., Sec. 345), *supra,* would be meaningless, if the District Court's decree thereunder, adjudging an Indian's right to an allotment to lands previously selected but not allotted, can be nullified by an administrative officer's decision. This is more readily apparent when it is remem-

bered that said Act provides that "the judgment or decree" rendered in an action brought by such an Indian claimant "shall have the same effect, as if such allotment had been allowed and approved by him (the Secretary)."

The position taken herein is not inconsistent with the several statutes involved. Act of August 15, 1894; Act of February 6, 1901; Act of June 25, 1910; and Act of March 3, 1911. These Acts are *in pari materia.* They must be construed together; they must be harmonized, if possible; and each thereof must be given full force and effect, if thereby no violence is done to other such statutes.

Ingels v. Riley, 5 Cal. 2d 154;

Lucas v. City of Los Angeles, 10 Cal. 2d 476;

Raynor v. City of Arcata, 11 Cal. 2d. 113;

59 Corpus Juris 1042 *et seq.*

So considered and construed, the statutes under consideration are harmonious, and form a pattern in accord with the fundamental principle inherent in Indian affairs and rights that "Legislation must be construed in a way most favorable to the Indian." (*Arenas v. United States,* 181 F. 2d 62, 66.)

To hold, under the jurisdictional Act of 1894, as amended (25 U. S. C. A., Sec. 345), that the Court had jurisdiction to adjudge and decree as an indispensable incident to the litigation, that Lee Arenas, as heir at law of his wife, was entitled to the lands selected for allotment by his deceased wife does no violence to the Act of June 25, 1910. On the other hand, to hold that the Secretary could refuse to make or approve allotments, that after years of delay and after the Indian was forced to

bring suit and after judgment had been made and entered making the allotment, he could then overturn and make invalid the judgment, would mean the emasculation of the jurisdictional statute. It is submitted that no such purpose was intended by the Congress in passing these several Acts, and no such result is permissible under the *in pari materia* rule of construction.

Under our construction of these statutes, the Secretary retains all of the power actually granted him to determine heirship, and the district courts retain the jurisdiction granted them to determine the right of any Indian, and of all Indians, to allotments of land claimed by them and to pass upon any and all questions necessary to determine that right. This result is in accordance with any proper concept of jurisdiction, and statutory construction.

Conclusion.

In view of the foregoing, the judgment of the District Court herein is erroneous and should be reversed *in toto*.

Respectfully submitted,

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